No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

vs.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Wisconsin Supreme Court

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does a statute increasing the penalty for battery when the victim is selected because of his race violate the First Amendment?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system. CJLF seeks to defend the rights of victims of crime and the law-abiding public to a criminal justice system which will effectively enforce the law and administer the punishment necessary to protect society.

The present case involves a claim that the First Amendment limits the authority of the state to consider an especially pernicious *mens rea* when fixing the punishment for a crime of violence, even though the statute regulates neither expression nor expressive conduct. Such a rule would detract from the ability of the state to apportion the punishment to the crime, and it would call

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1. Both parties have consented in writing to the filing of this brief.

into question many practices in sentencing and admission of evidence which are presently unquestioned. These effects are contrary to the interests of victims and society which CJLF was formed to protect. CJLF therefore has an interest in this case.

SUMMARY OF FACTS AND CASE

The facts of the case are undisputed and are stated in the opinion of the Wisconsin Supreme Court, *State* v. *Mitchell*, 485 N. W. 2d 807, 809 (1992). A group of young black men and boys, at the direction of defendant Todd Mitchell, severely beat 14-year-old Gregory Reddick, selecting him because of his race. Gregory may have suffered permanent brain damage. The group was angered by the depiction of racially motivated violence by whites against blacks in the movie "Mississippi Burning."

Mitchell was convicted of aggravated battery, which is normally punishable by a maximum of two years. Mitchell received an increased sentence of four years because of his intentional selection of Gregory on the basis of race. *Ibid*.

The court of appeals affirmed. It rejected vagueness and overbreadth challenges and held an equal protection challenge to be procedurally barred. *Id*., at 808. The Wisconsin Supreme Court reversed on First Amendment grounds, *ibid*., and did not discuss the equal protection or vagueness claims, *id*., at 809, n. 2.[2]

SUMMARY OF ARGUMENT

The First Amendment has no application to this case. The statute in question does not regulate speech, expressive conduct, or conduct commonly associated with expression.

The consideration of motive for a criminal act in establishing the sentence for that act does not violate the First Amendment. Numerous criminal statutes consider motive, including juror and witness retaliation laws, civil rights laws such as 18 U. S. C. § 241, and capital sentencing laws. In the latter context, the Constitution has been construed to *require* consideration of motive in sentencing.

The statute is not unconstitutionally overbroad. The overbreadth doctrine is inapplicable to statutes which do not regulate expression. If there is any overbreadth, it is not substantial. There is little, if any, "chilling effect" on speech from the evidentiary use of speech to prove the *mens rea* of this offense. If there is any chilling effect, it is insufficient to invalidate the statute.

A vagueness challenge cannot be sustained in this case. The statute is not vague as applied to the facts of this case.

2. The state court of appeals holding that the equal protection claim is barred is therefore the last state court opinion on the issue. Cf. *Ylst* v. *Nunnemaker*, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991).

ARGUMENT

I. Violence is not speech.

"The First Amendment does not protect violence." *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 916 (1982). This point is so simple and obvious that one would think it unnecessary to even mention, much less brief. Yet the opinion of the Wisconsin Supreme Court in the present case makes it necessary. The court below has applied the First Amendment to a statute which punishes an act of violence combined with a *mens rea* but which contains no element of expression or expressive conduct. Such a staggering expansion of the First Amendment must be confronted head-on.

The opinion below is, in large part, a misapplication of *R.A.V.* v. *St. Paul*, 120 L. Ed. 2d 305, 112 S. Ct. 2538

(1992). The ordinance at issue in *R.A.V.* was direct regulation of expression, prohibiting the placement of "a symbol, object, appellation, characterization or graffiti" of certain proscribed content. *Id.*, 120 L. Ed. 2d, at 315, 112 S. Ct., at 2541 (quoting Minn. Legis. Code § 292.02 (1990)).

There is a fundamental difference between expression which has traditionally been excluded from First Amendment protection, on the one hand, and conduct which is not "speech" at all, on the other. The former category includes "fighting words," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942); obscenity, *Roth* v. *United States*, 354 U. S. 476, 486 (1957); and child pornography, *New York* v. *Ferber*, 458 U. S. 747, 763 (1982). *R.A.V.* holds that within these categories, a state may not prohibit those expressions it opposes while permitting those proscribable expressions it favors. 120 L. Ed. 2d, at 317-320, 112 S. Ct., at 2542-2545. "Where the statute is directed at conduct rather than speech," however, see *id.*, 120 L. Ed. 2d, at 322, 112 S. Ct., at 2546, we have a horse of an entirely different color. Characterization of the latter category " 'as not being speech at all' " is not "shorthand"; it is "literally true." Cf. *id.*, 120 L. Ed. 2d, at 318, 112 S. Ct., at 2543.

The present case involves the crime of aggravated battery with a penalty enhancement under Wis. Stat. § 939.645. The validity of the battery statute is unchallenged, while the penalty enhancer applies to a person who "[i]ntentionally selects the [victim] . . . because of the race . . . of that person . . . ." *Id.*, subd. (1)(b).[3] Neither the underlying statute nor the penalty enhancer mentions

3. For brevity, we will refer only to selection by race for the remainder of this brief. The statute includes several other classifications.

any form of expression, unless one considers violence to be a form of expression.[4]

If *R.A.V.* really stood for the radical proposition adopted below, it would be necessary to overrule it and adopt instead the theory of the concurring Justices in that case.[5] To avoid such an absurd extrapolation of *R.A.V.*, it is necessary to stake out the outer boundaries of expression.

In *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968), this Court declared that it "cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." However, the Court assumed "that the alleged communicative element in O'Brien's conduct is sufficient *to bring into play the First Amendment*," *ibid.* (emphasis added), and proceeded to promulgate the four-part *O'Brien* test, *id.*, at 377.

Thus, the spectrum of speech to conduct is divided into three regions. "Pure speech" in a public forum cannot be prohibited in the absence of a compelling government interest; only time, place, and manner regulation is permitted. *United States* v. *Grace*, 461 U. S. 171, 177 (1983). For those types of conduct which are sufficiently expressive to bring into play the First Amendment, the four-part *O'Brien* test applies. Where the expressive component of the conduct is insufficient, the First Amendment is simply inapplicable.

4. Mitchell posits a hypothetical of the enhancement provision increasing a sentence for disorderly conduct consisting of "fighting words." Brief in Opposition 11. Whether the rule in *R.A.V.* precludes application of the enhancement to such a crime is a question which can await a case which presents it. This point is discussed further under "overbreadth," part III, *post*, at 23-24.

5. The overbreadth analysis of Justice White's opinion would not apply to this statute, for the reasons discussed in part III, *post*, at 22-23.

The sufficiency of the expressive component was rather obvious in most of the succeeding "expressive conduct" cases. Many cases involved public protests. See *Texas* v. *Johnson*, 491 U. S. 397, 399 (1989) (flag burning); *United States* v. *Eichman*, 496 U. S. 310, 312 (1990) (same); *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 291-292 (1984) (sleeping in park to demonstrate plight of homeless); *Spence* v. *Washington*, 418 U. S. 405 (1974) ("peace symbol" taped on flag). Other cases involved conduct which was engaged in solely for the purpose of being seen by others, with no other direct consequence. See *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 86 (1977) ("for sale" signs); *Barnes* v. *Glen Theatre, Inc.*, 115 L. Ed. 2d 504, 509, 111 S. Ct. 2456, 2458 (1991) (nude dancing).

The *Barnes* case is particularly instructive in marking the outer limit of First Amendment protection of conduct. The plurality states that nude dancing "is expressive conduct within the *outer* perimeters of the First Amendment, though we view it *as only marginally so*." 115 L. Ed. 2d, at 511, 111 S. Ct., at 2460 (emphasis added). Justice Scalia, who later wrote *R.A.V.*, flatly denied that nudity regulation was "subject to a First-Amendment scrutiny at all." *Id.*, 115 L. Ed. 2d, at 515, 111 S. Ct., at 2463 (concurrence in the judgment). Justice Souter agreed that nude dancing "is subject to a degree of First Amendment protection," but only after carefully distinguishing other types of dancing and other circumstances of nudity. *Id.*, 115 L. Ed. 2d, at 521, 111 S. Ct., at 2468 (concurrence in the judgment). This discussion appears to concur with the plurality's characterization of nude dancing as within the limits of protection, but only marginally.

A number of other cases have rejected First Amendment claims on the ground that the conduct in question was simply beyond the boundary of what can be considered "speech." In *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697 (1986), the district attorney closed down an "adult" bookstore for knowingly permitting lewd acts on the premises. *Id.*, at 698-699. The New York Court of Appeals had applied the *O'Brien* test because "the closure order . . . would also impose an incidental burden on [the owners'] bookselling activities." *Id.*, at 704-705.

This Court emphatically reversed. The conduct in the case "manifests absolutely no element of protected expression." *Id.*, at 705. The *O'Brien* test "has no relevance to a statute directed at imposing sanctions on nonexpressive activity." *Id.*, at 707. Justice O'Connor, joined by Justice Stevens, concurred, saying that "a First Amendment standard of review" does not apply "where as here, the government is regulating neither speech nor an incidental, nonexpressive effect of speech." *Id.*, at 708.

FTC v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411 (1990) is similar. The trial lawyers boycotted indigent criminal defense appointments in order to force an increase in pay. *Id.*, at 416. The FTC decided that the boycott was an illegal restraint of trade. *Id.*, at 418-419. The Court of Appeals applied an analysis derived from *O'Brien*, *id.*, at 429, and this Court reversed.

One of the "critical flaws" in the lower court's analysis was that "it exaggerates the significance of the expressive component" of the trial lawyers' action. *Id.*, at 430. This Court acknowledged that the boycott did have an expressive component, as does every boycott, *id.*, at 434, but nonetheless held that the *per se* rule of illegality applied. *Id.*, at 436. The majority then applied straight antitrust analysis, *id.*, at 434-436, and not the special rules applicable to First Amendment cases. Cf. *id.*, at 440 (Brennan, J., dissenting). Implicit in the rejection of the dissent's argument is the conclusion that this was not a First Amendment case. The trial lawyers' boycott was primarily an act of economic coercion, even though it had some expressive component, and the First Amendment was therefore inapplicable. The majority distinguished

Claiborne Hardware Co., *supra*, on the basis of the political object of the boycott in that case. *Id.*, at 426-427.

Dallas v. *Stanglin*, 490 U. S. 19 (1989) also considered the magnitude of the expressive component of the conduct in question, "It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Id.*, at 25. Associating for the purpose of recreational dancing was therefore not "the sort of expressive association that the First Amendment has been held to protect." *Id.*, at 24. The first question to be asked in the present case is whether any more than a kernel of expression is involved here. If not, this is simply not a First Amendment case.

Lakewood v. *Plain Dealer Publishing Co.*, 486 U. S. 750 (1988) laid the foundation for *R.A.V.*'s holding that a state may not selectively prohibit, on the basis of content, expressive conduct which it could ban altogether. *Lakewood* involved a facial challenge to an ordinance giving the mayor "unbridled discretion over which publishers may place newsracks on public property and where." *Id.*, at 753.

A facial challenge based on merely potential censorship lies only if the regulation governs "expressive activity." *Id.*, at 755; *id.*, at 776 (White, J., dissenting). The threshold question, on which the Court divided 4-3 (two Justices not participating), was whether the case involved "activity protected by the First Amendment" at all. See *id.*, at 784 (White, J., dissenting). The majority found that it did, phrasing the test this way: "The law must have a close enough nexus to *expression*, or to conduct *commonly associated with expression*, to pose a real and substantial threat of the identified censorship risks." *Id.*, at 759 (emphasis added). The "commonly associated" category seems to include those acts generally employed to "get the word out," such as placing newsracks, selling pamphlets, see *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943), and picketing, see *Police Department of Chicago* v. *Mosely*, 408 U. S. 92, 97-98 (1972).

The penalty-enhanced crime in the present case consists of three parts: the act of aggravated battery; the *mens rea* required for that crime generally; and the mental process of choosing a victim on the basis of race. None of these elements has any more than the kernel of expression found insufficient in numerous cases.

Just as being nude in public, "without more, apparently expresses nothing beyond the view that the condition is somehow appropriate to the circumstances," *Barnes* v. *Glen Theatre, Inc.*, 115 L. Ed. 2d, at 521, 112 S. Ct., at 2468 (Souter, J., concurring in the judgment), so beating up a person because of his race, without more, expresses nothing beyond the view that such action is somehow justifiable. The underlying reason may be misdirected anger over past injustices, as in the present case, a racist goal of keeping a given group "in their place," see, *e.g.*, *United States* v. *Guest*, 383 U. S. 745, 747 (1966), or the most bizarre delusion imaginable, see *People* v. *Manson*, 61 Cal. App. 3d 102, 129, 132 Cal. Rptr. 265 (1976).[6] These underlying reasons are not expressed by the physical act of violence and the mental act of selecting the victim, which are the elements of the offense. Neither of these elements is "expression," and neither is "conduct commonly associated with expression." Cf. *Lakewood*, *supra*, 486 U. S., at 759.

The state court in the present case committed the same fundamental error as the D.C. Circuit in the *Trial Lawyers* case, *supra*: "it exaggerates the significance of the expressive component." 493 U. S., at 430. The

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6. Truth is stranger than fiction. Some wild hypotheticals have been thrown around in this debate, see, *e.g.*, Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence?*, 39 UCLA L. Rev. 333, 356 (1991), but none so strange as the true story of the Charles Manson "family."

expression involved here is no greater than the "kernel" found insufficient to invoke First Amendment analysis in other cases. See *Dallas* v. *Stanglin*, *supra*, 490 U. S., at 25; see also *Arcara*, *supra*, 478 U. S., at 707.

The First Amendment and all its associated tests of higher scrutiny are simply inapplicable to this case. Violence is not speech.

II. Consideration of motive in sentencing does not invoke the First Amendment.

A. General Principles.

The statute at issue in the present case deals with discrimination, not motive. *Amicus* CJLF will not brief this point because we understand it will be thoroughly covered in other briefs.

Assuming for the sake of argument that the Wisconsin Legislature *has* chosen to consider motive in setting the punishment for aggravated battery, does such consideration invoke the special scrutiny of First Amendment analysis? *Amicus* submits that it does not. Motive is not expression.

In striking down the present statute, the court below relied heavily on what it called the "insightful analysis" in Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence?*, 39 UCLA L. Rev. 333 (1991):

> "The model statute does not address effects, state of mind, or a change in the character of the offense, but only the thoughts and ideas that propelled the actor to act. The government could not, of course, punish these thoughts and ideas independently. That they are held by one who commits a crime because of his or her beliefs does not remove this constitutional shield. Of course, the First Amendment protection guaranteed the actor's thoughts does not protect him or her from prosecution for the associated action. Neither, however, does the state's power to punish the action remove the constitutional barrier to punishing the thoughts." *State* v. *Mitchell*, 485 N. W. 2d 807, 812 (Wis. 1992) (quoting Gellman, *supra*, at 363).

The errors in this analysis are numerous and serious. First, the offender's purposeful decision to attack a person of a given race certainly is "state of mind." Second, one would have to be a hermit to believe that a racially-motivated assault in America today is not an offense of a different character,[7] just as surely as premeditated murder is different from malicious but unpremeditated murder.

Most egregious of all, however, is the assertion that government's inability to punish thought alone somehow limits government's ability to punish a combination of thought with nonexpressive conduct which carries out that thought. This is nothing less than an attempt to constitutionalize the law of *mens rea*. The attempt should be squarely rejected.

The notion that crime is "constituted only from concurrence of an evil-meaning mind with an evil-doing hand" has deep roots in Anglo-American law. *Morissette* v. *United States*, 342 U. S. 246, 251-252 (1952). While courts were historically unanimous on this central thought, there was great diversity in "their definitions of the requisite but elusive mental element." *Id.*, at 252.

The argument that the government cannot consider "thought" in fixing the degree of the offense or in determining the punishment sweeps far too broadly. Premeditation, for example, is pure thought. It requires that the

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7. "The hate or terrorism element of the crime allows Congress or the states to punish that element more severely because the hate aspect of the crime *affects* both the *harm [caused] by the act* and the likelihood of recidivism by the perpetrator." 4 R. Rotunda & J. Nowak, *Treatise On Constitutional Law* § 20.49, at 351 (2d ed. 1992) (emphasis added).

defendant "did in fact reflect, at least for a short period of time before his act of killing." 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 7.7, at 237 (1986). Yet premeditation is a key element of first degree murder in nearly all states which divide murder into degrees. *Id*., at 236. Theorists may debate the wisdom of this division, see *id*., at 241, but its constitutionality is beyond question.

One can quote learned authorities for the proposition that motive *ought* not be an element of an offense.

> "A defendant's motive, if narrowly defined to exclude recognized defenses and the 'specific intent' requirements of some crimes, is not relevant on the substantive side of the criminal law. On the procedural side, a motive for committing a crime is relevant in proving guilt when the evidence of guilt is circumstantial, and a good motive may result in leniency by those who administer the criminal process." 1 LaFave & Scott, *supra*, § 3.6, at 318.

Yet even this carefully hedged statement is merely a description of what the criminal law has generally been and what the authors think it ought to be. It is not a statement of a constitutional mandate. Nowhere does the Constitution require legislatures to conform to the "better view." See *Spencer* v. *Texas*, 385 U. S. 554, 567-568 (1967). In circumstances which they deem appropriate, legislatures can and do make motive an element of an offense or a factor in sentencing. Some examples include juror and witness retaliation statutes, civil rights law, and capital sentencing systems.

B. Juror and Witness Retaliation.

Suppose A serves as a juror in B's federal court case and renders a verdict against B. B later assaults A. If B's *reason* for assaulting A was unrelated to the court case, there is no federal interest. The crime is the state offense of assault. On the other hand, if B assaulted A "on account of" the verdict, B has committed a crime

against the United States. 18 U. S. C. § 1503. Such a crime interferes with the operation of the courts by causing future jurors to fear retaliation. The same is true for an assault on a witness "with intent to retaliate" for testimony. 18 U. S. C. § 1513.

The mental element of these crimes is different from those of "specific intent" crimes such as burglary. In burglary, the building is entered as an intermediate step toward some ultimate act, usually theft. See generally *Taylor* v. *United States*, 495 U. S. 575, 598 (1990). In these retaliation crimes, however, there is no ultimate end. The trial is over. The assault has no purpose but vengeance. It is the *reason* for the assault, and only that reason, which makes the assault a federal offense and greatly increases the punishment. Compare 18 U. S. C. § 1513 (10 years + $250,000) with, *e.g.*, Cal. Penal Code § 241(a) (6 months + $1,000).

B is, of course, entitled to think and believe that A's verdict was unjust. Losing litigants generally do. He is even entitled to think and believe that A is a scoundrel who deserves to be beaten. Once he *acts* on that belief, however, his reason becomes the *mens rea* of a criminal offense.

In discussing the statute in the present case, the state court said "The statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection." 485 N. W. 2d, at 812 (emphasis in original). This is equally true of the juror and witness retaliation statutes. If the use of the reason for the offense as an element violates the First Amendment, then those statutes are unconstitutional. If not, the statute in the present case does not violate the First Amendment.

C. Civil Rights Laws.

The state court distinguished civil rights laws on the grounds that they punish discriminatory acts, rather than mental processes, and because they impose civil rather than criminal penalties. *Mitchell*, *supra*, 485 N. W. 2d, at 816-817. Even if these distinctions were correct and relevant,[8] the distinctions only account for the 1964 act. The state court's logic fails to distinguish Reconstruction civil rights legislation which has survived over a century of bitter litigation.

Among the surviving legislation of the Reconstruction Era is 18 U. S. C. § 241. This is a criminal statute; violations can be punished by ten years or even life in prison. The statute contains precisely the phrase which the state court found so troublesome in the Wisconsin statute:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or *because of* his having so exercised the same . . . ." 18 U. S. C. § 241 (emphasis added).

The "because of" clause of this statute is not distinguishable from the penalty enhancement provision in the present case. The statute converts what would otherwise be a common offense, usually assault or battery, into a special and severely punished crime, based on the reason the act was committed.

In re Quarles, 158 U. S. 532 (1895) illustrates the "because of" clause. One Henry Worley reported a bootlegger to the federal deputy marshal. In retaliation, Quarles and Butler beat and attempted to murder Worley. *Id.*, at 532-533. The Court held that reporting

8. They are not, but we leave that argument to the state and other *amici*.

a violation of federal law was a right of federal citizenship, and that a conspiracy to injure the citizen "because of" his exercise of that right violated the predecessor of section 241. *Id.*, at 537-538.

The rights which people have and ought to have are controversial subjects. People are entitled to hold and express beliefs that some rights now cognized ought not be rights. Once they conspire to injure a person *because of* that person's exercise of federal rights, however, they commit a federal crime.

The First Amendment applies to the states only through the Fourteenth Amendment. See *Schneider* v. *State*, 308 U. S. 147, 160 (1939). The Radical Republicans who proposed the Fourteenth Amendment also passed the Ku Klux Act specifically for the purpose of protecting people from attacks "on account of their group affiliation." *Bray* v. *Alexandria Women's Health Clinic*, No. 90-985 (U. S. Jan. 13, 1993) (O'Connor, J., dissenting), part I A. It would be a truly bizarre construction of the Constitution to hold that the Fourteenth Amendments forbids the states to provide the same kind of protection that the Reconstruction Congress itself enacted.

D. Capital Murder.

The most serious crimes have been given the strictest definitions, particularly with regard to the *mens rea*. The fine distinctions are generally to the defendant's benefit, lowering the offense to a noncapital crime (second degree murder or voluntary manslaughter) when the stringent *mens rea* element cannot be proven.

Even in cases of first degree murder, however, this Court has construed the Constitution to require further narrowing. A statute sentencing all first degree murderers to death has been held unconstitutional. *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). Something more is required, both in narrowing the eligible class and in granting mercy to those within the eligible class. *Lowen-*

field v. *Phelps*, 484 U. S. 231, 246 (1988). That "something more" is often explicit consideration of motive.

Suppose, for example, A and B rape and murder C's young sister. They confess fully, freely, voluntarily, and with evident relish, yet their conviction is reversed because the arresting officer inadvertently skipped one of the *Miranda* warnings while reading the card. Other evidence is insufficient, and A and B "walk." C then kills them both, a capital offense. See, *e.g.*, Cal. Penal Code § 190.2(a)(3).

As deplorable as "taking the law into your own hands" may be, one would need a heart of stone to be unmoved by the powerful mitigating factor of C's motive. The Constitution of the United States, as construed by this Court, not only *permits* consideration of this mitigating factor, it affirmatively *requires* that the sentencer not be precluded from considering the factor. *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality). The jury must be given instructions which provide a vehicle for such consideration. *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989).

It might be argued that good motive (or at least understandable motive) may be considered in mitigation but not in aggravation. See LaFave quote, *ante*, at 12. In reality, though, there is no difference. Suppose, for example, that Wisconsin punished aggravated battery with a minimum sentence of four years, but with a reduction to two years or less for assaults committed for reasons less harmful to society than the one at issue in this case. The result would be exactly the same: a difference in sentence based on the reason for the assault. Cf. *State* v. *Mitchell*, 485 N. W. 2d 807, 809 (Wis. 1992). That differential is either constitutional or it is not, regardless of whether it is achieved through aggravation or mitigation.

While attempting to distinguish aggravating circumstances in capital cases from "hate crime" penalty enhancement statutes, Gellman distinguishes murder for hire from murder for financial gain. "[M]urder for hire is a different act than other murder; the state is not seeking to punish or deter the motive of profit-seeking, but the medial end of creating contracts to kill." Gellman, *supra*, 39 UCLA L. Rev., at 365.

Gellman's argument proves too much, however. The choice to consider murder for hire, rather than financial gain, as the aggravating circumstance was simply a legislative choice made in Gellman's home state of Ohio. See *ibid*. Other states can and do consider all financially motivated killings to be more evil than killings in anger. "It has been widely recognized that murder for financial gain is an especially vile crime for which the death penalty may appropriately be imposed." *People* v. *Edelbacher*, 47 Cal. 3d 983, 1025, 766 P. 2d 1, 26 (1989); see also *Model Penal Code & Commentaries*, part II, vol. 1, § 210.6, pp. 109-110 (1980). The financial gain circumstance does consider motive. Hence an instruction that motive is not an element would be error if applied to the circumstance rather than the underlying offense. *Edelbacher*, *supra*, 47 Cal. 3d, at 1027, 766 P. 2d, at 27.

A number of states use financial motive, not limited to contract murder, as an aggravating circumstance. See Ala. Code § 13A-5-49(6) (Michie Supp. 1992); Ark. Code Ann. § 5-4-604(6) (Michie Supp. 1991); Del. Code Ann. § 11-4209(e)(1)(o) (Michie Supp. 1992); N.H. Rev. Stat. Ann. § 630:5 VII(i) (Butterworth Supp. 1992); Neb. Rev. Stat. § 29-2523(1)(c) (1989); Utah Code Ann. § 76-5-202(1)(f) (Michie Supp. 1992); Wyo. Stat. Ann. § 6-2-102(h)(vi) (Michie Supp. 1992).

Consideration of racial motive in capital sentencing was approved in *Barclay* v. *Florida*, 463 U. S. 939 (1983). *Barclay* is not distinguishable from the present case in any way favorable to Mitchell. There are differences, but they cut the other way. Barclay, like Mitchell, selected a victim on the basis of his race. *Id*., at 942 (plurality

opinion). Unlike Mitchell, Barclay killed his victim, *ibid.*, engaged in expressive activity, *id.*, at 943, and was sentenced to death, *id.*, at 945.

The sentence of death heightened the degree of constitutional scrutiny applied to the sentencing proceeding. See, *e.g.*, *id.*, at 958-959 (Stevens, J., concurring in the judgment). The court received evidence of notes written and tapes made by the defendants, before and after the crime. *Id.*, at 942-943. This evidence would raise more First Amendment concerns than anything introduced in the present case. The trial judge expressly considered "the racial motive for the murder" in reaching his sentencing decision. *Id.*, at 948.

Barclay is a divided opinion, but there is no disagreement on the point relevant to this case: the judge's consideration of motive was proper. The holding was stated this way in a later majority opinion joined by the authors of both *Barclay* opinions:

> "In *Barclay* . . . we held that a sentencing judge in a capital case *might properly take into consideration 'the elements of racial hatred'* in Barclay's crime as well as 'Barclay's desire to start a race war.' See *id.*, at 949 (plurality opinion); *id.*, at 970, and n. 18 (Stevens, J., concurring in judgment)." *Dawson* v. *Delaware*, 117 L. Ed. 2d 309, 316-317, 112 S. Ct. 1093, 1097 (1992) (emphasis added).

Thus, there is no constitutional prohibition against consideration of the racial motivation for a crime in determining the sentence for that crime. What *is* constitutionally required is a *connection* between *mens rea* and the offense.

Dawson, *supra*, clearly illustrates the distinction. Dawson, like Barclay, was a member of a racist gang, 117 L. Ed. 2d, at 315, 112 S. Ct., at 1096, and at least presumably shared the gang's racist beliefs. Unlike Barclay, however, Dawson's racism had nothing to do with the case. *Id.*, 117 L. Ed. 2d, at 317-318, 112 S. Ct., at 1098.

Abstract beliefs and expressive association *alone*, unconnected to any crime or any other relevant sentencing factor, cannot be used to increase a sentence. *Id.*, 117 L. Ed. 2d, at 318, 112 S. Ct., at 1098. Once the connection is made, however, thoughts and their expression can be considered. *Ibid.* Failure to recognize the importance of the connection is the central fallacy of the opinion below.

"Neither, however, does the state's power to punish the action remove the constitutional barrier to punishing the thoughts." *State* v. *Mitchell*, *supra*, 485 N. W. 2d, at 812 (quoting Gellman, *supra*, at 363). This is a fundamental misunderstanding of the nature of sentence enhancements. The state is *not* punishing the thoughts. It is *considering* the thoughts in determining how severely to punish the *action*. This *Barclay* holds to be constitutional.

E. Recidivism Enhancements.

The recidivist sentencing cases clearly demonstrate the distinction between punishing a factor separately, see *Mitchell*, 485 N. W. 2d, at 815, n. 17, and considering that factor in determining punishment for the act. In *McDonald* v. *Massachusetts*, 180 U. S. 311 (1901), a habitual criminal had been sentenced to 25 years in prison under a statute which applied to persons with two prior convictions. *Id.*, at 311. He claimed double jeopardy. See *id.*, at 313. If the enhancement for the priors were to be examined separately, this objection would be valid. McDonald had already been punished for those offenses.

> "The *fundamental mistake* of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished . . . .
>
> "But it does no such thing . . . . The punishment is for the new crime only, but is the heavier if he is an habitual criminal." *Id.*, at 312.

On this principle, the Court rejected the double jeopardy and *ex post facto* claims, *id.*, at 313,[9] and it has continued to reject such claims. *Graham* v. *West Virginia*, 224 U. S. 616, 631 (1912); *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948). The validity of such laws "is no longer open to serious challenge." *Oyler* v. *Boles*, 368 U. S. 448, 451 (1962); see also *Parke* v. *Raley*, 121 L. Ed. 2d 391, 401-402, 113 S. Ct. 517, 521-522 (1992).

Although invoking a different constitutional provision, the Wisconsin Supreme Court in the present case makes the same "fundamental mistake" as the defendant in *McDonald*. It looks at the sentence enhancement separately and asks, as a matter of federal constitutional law,[10] whether the facts required for the enhancement finding could be punished separately. *Mitchell*, 485 N. W. 2d, at 815, n. 17. Having asked the wrong question, it then produces an irrelevant answer.

Contrary to the state court's assertion, *ibid.*, a penalty enhancement need not stand alone simply because it is an additional or greater punishment rather than a factor to be considered within otherwise allowable sentencing limits. The statute in *Graham*, *supra*, 224 U. S., at 622, imposed an additional five-year term for one prior and a life term for two priors.

Petitioner emphasizes that the penalty enhancement will, in some cases, "all alone" convert a misdemeanor to a felony. Brief in Opposition 17. The answer, again from the recidivist cases, is that the enhancement is not

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9. The Double Jeopardy Clause had not been expressly "incorporated" at that time, but the *McDonald* Court found it unnecessary to even consider that question. *Ibid.*

10. There is no indication in the opinion that it rests on any independent considerations of state law. See *Michigan* v. *Long*, 463 U. S. 1032, 1040-1041 (1983). The Wisconsin court has adopted the federal First Amendment analysis of an Ohio lawyer, published in a California law review, regarding a nationwide model statute.

considered "all alone." Recidivist statutes frequently elevate misdemeanor petty theft to a felony for recidivists, see, *e.g.*, Cal. Penal Code § 666, and the constitutionality of such enhancement is well settled, see, *e.g.*, *People* v. *Tijerina*, 1 Cal. 3d 41, 47, 459 P. 2d 680, 683 (1969).

In short, the lesson of the recidivist cases is this: The state may enhance a sentence for a crime on the basis of facts which it could not punish independently. It makes no constitutional difference whether the enhancement is a separate term, a change in the grade of offense, or a guideline within the statutory range for the underlying offense.

III. The statute is not unconstitutionally overbroad.

The Wisconsin Supreme Court held that the statute in this case "is also unconstitutionally overbroad." *State* v. *Mitchell*, 485 N. W. 2d 807, 815 (1992). On the contrary, it is the state court's interpretation of the overbreadth doctrine that is overbroad.

"The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, 458 U. S. 747, 767 (1982). Thus, Mitchell's argument about application of the enhancement statutes to "situations in which the underlying offense openly involves speech," such as disorderly conduct consisting of "fighting words," Brief in Opposition 11, is irrelevant unless the case comes within an exception to the "traditional rule."

The only arguably applicable exception is the overbreadth doctrine. This extraordinary doctrine permits a litigant to attack a statute based on potential application to other people, because of the concern that "it also threatens others . . . who desire to engage in *legally protected expression* but who may refrain from doing so

rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 503 (1985) (emphasis added). The scope of the overbreadth doctrine "must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted." *Ferber*, *supra*, 458 U. S., at 769. The overbreadth doctrine is "strong medicine" applied "sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973).

The overbreadth doctrine should not be invoked in this case. There is little, if any, constitutionally protected expression involved. The statute, if overbroad at all, is not substantially so. The statute involves only conduct and not "pure speech." It has little or no "chilling effect."

A. Protected Expression.

To apply the overbreadth doctrine under the rationale *Brockett* gives for it, one must identify legally protected expression, *i.e.* expression people have the legal right to engage in, which people may fear they will be prosecuted for under the statute. This cannot be done in the present case, because this statute does not draw any lines between legal and illegal conduct or speech. The statute only fixes the punishment for criminal conduct.

In the First Amendment area, vague statutes are especially disfavored because they inhibit protected expression. "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked." *Grayned* v. *Rockford*, 408 U. S. 104, 109 (1972) (internal quotation marks omitted).

Overbroad laws have a similar vice. *Id.*, at 114. Unless narrowed through construction or partial invalidation, see *Osborne* v. *Ohio*, 495 U. S. 103, 112-113 (1990) (narrowing construction); *Brockett*, *supra*, 472 U. S., at 504 (partial invalidation), the existence of the statute will

deter protected, legal expression by people who are uncertain whether the statute will actually be struck down.

With vagueness, the line between the legal and the illegal under the statute is blurred, and legal expression is thereby deterred. With overbreadth, the statute itself straddles the line between legal and illegal, and the legality of speech would turn on the outcome of case-by-case constitutional adjudication if the entire statute were not struck down. "The crucial question, then, is whether the ordinance *sweeps within its prohibitions what may not be punished* under the First and Fourteenth Amendments." *Grayned*, *supra*, 408 U. S., at 114-115.

The statute in the present case does not prohibit any protected expression. A person who limits himself to protected expression will never be in jeopardy of a sentence enhancement, because there is no underlying sentence to enhance. The overbreadth doctrine is therefore inapplicable.

B. Substantial Overbreadth.

The overbreadth doctrine is applied most vigorously to statutes regulating "pure speech." Conversely, its function attenuates as the behavior in question moves toward conduct. *Broadrick*, *supra*, 413 U. S., at 615. The present case involves conduct and the *mens rea* associated with that conduct and little, if any, speech. If the overbreadth doctrine applies at all, the statute would have to be substantially overbroad to be invalid. *Ibid.*; *Ferber*, *supra*, 458 U. S., at 770.

The penalty enhancer applies to the underlying offenses set forth in ten chapters of the Wisconsin criminal law. Wis. Stat. § 939.645(1)(a). To invoke the rule of *R.A.V.*, Mitchell plucks out a handful of sections where the underlying offense may consist of speech rather than conduct. Brief in Opposition 11. Even assuming for the sake of argument that *R.A.V.* would preclude enhancement of these "speech crimes" on the basis of content,

these limited examples do not render the statute substantially overbroad. These are "marginal applications," and "the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .' " *Parker* v. *Levy*, 417 U. S. 733, 760 (1974) (quoting *CSC* v. *Letter Carriers*, 413 U. S. 548, 580-581 (1973)). The overbreadth doctrine does not apply to such statutes.

C. "Chilling Effect" and Speech Evidence.

Of all the errors in the majority opinion, one stands above all others in its breathtaking potential to wreak havoc in the criminal law. This is the assertion that the statute is unconstitutional because speech will often be used as evidence of the racially discriminatory selection, thereby "chilling" protected expression. *State* v. *Mitchell*, *supra*, 485 N. W. 2d, at 815-816.

It is hornbook law that "[t]he motive with which an actus reas was committed is always relevant and material." R. Perkins & R. Boyce, *Criminal Law* 928 (3d ed. 1982) (footnotes omitted); see also 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.6, at 318 (1986). Indeed, one court went so far as to hold that, absent extremely strong evidence of planning activity, evidence of motive was essential to proof of premeditation, and a conviction of first degree murder would be reversed for insufficiency of evidence without it. *People* v. *Anderson*, 70 Cal. 2d 15, 27, 447 P. 2d 942, 949 (1968).[11]

Motive, intent, and premeditation are often proved by the defendant's speech. This evidentiary use of speech does not render consideration of these mental states unconstitutional. The state court was concerned that a thug's use of a racial epithet would be used against him.

11. The California Supreme Court has since backed away from this categorical statement, *People* v. *Perez*, 2 Cal. 4th 1117, 1125, 831 P. 2d 1159, 1163 (1992), but motive evidence remains extremely important.

Mitchell, *supra*, 485 N. W. 2d, 816. These epithets may be constitutionally privileged when not part of a crime, but they stand on no higher plane than such statements as "I hate Joe Smith." Yet no one doubts that the latter statement would be admissible on the issues of intent and premeditation in the murder of Joe Smith. A mental element of a crime is not unconstitutional simply because it is proved by defendant's speech.

If there is one definition of a crime that is unquestionably constitutional, it is the one contained in the Constitution itself. "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U. S. Const. art. III, § 3. If an interpretation of another part of the Constitution would render this definition unconstitutional, then that interpretation must be wrong.

Haupt v. *United States*, 330 U. S. 631 (1947) is one of the few treason cases to reach this Court. Hans Haupt was the father of a German saboteur and gave him aid and comfort. The major question was whether he did so out of "parental solicitude" or out of "adherence to the enemy." *Id.*, at 641. Only the latter is treason. In support of the verdict, the Court noted

> "the evidence of defendant's own statements that after the war he intended to return to Germany, that the United States was going to be defeated, that he would never permit his boy to join the American Army, that he would kill his son before he would send him to fight Germany, and others to the same effect . . . ." *Id.*, at 642.

The *Haupt* Court was sensitive to the First Amendment problems. "Such testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our own government . . . . But these statements were explicit and clearly were admissible on the question of

intent *and adherence to the enemy.*" *Ibid.* (emphasis added).

In other words, even at the solid core of the First Amendment—political disagreement with the government—speech is properly considered as evidence of *mens rea* when it is sufficiently connected with the crime.

The "adherence" element of treason is no less likely to chill protected speech than the "because of" element of the present statute. The state court seriously overestimated the chilling effect of the statute and seriously underestimated the degree of "chill" necessary to invalidate a statute.

> "It is no answer that one need only refrain from committing one of the underlying offenses to avoid the thought punishment. Chill of expression and inquiry by definition occurs *before* any offense is committed, and even if no offense is *ever* committed. The chilling effect thus extends to the entire populace, not just to those who will eventually commit one of the underlying offenses." *Mitchell*, 485 N. W. 2d, at 816 (quoting Gellman, *supra*, 39 UCLA L. Rev., at 61 (emphasis in original)).

This is a gross and patent overestimation of the "chilling effect." A person could only be "chilled" by the potential evidentiary use of his statements if he perceived a significant probability that he would be prosecuted. A person who has no intention of ever committing an underlying offense would not perceive such a probability. The chilling effect does *not* extend to the entire populace. Indeed, it is painfully evident today that racist speakers freely and frequently express their views, see, *e.g.*, *Forsyth County* v. *Nationalist Movement*, 120 L. Ed. 2d 101, 108, 112 S. Ct. 2395, 2398 (1992), despite the existence of hate crime legislation in nearly every state, see *Mitchell*, 485 N. W. 2d, at 811. Similarly, during the Vietnam War, it was equally evident that persons sympathetic to the other

side freely expressed that opinion without fear that it would be used against them in a prosecution for treason.

In short, it *is* an answer that one need only refrain from committing the underlying offense. One who has absolutely no intention of ever committing such an offense is not "chilled."

This Court addressed the degree of "chill" needed to invalidate a statute in *Younger* v. *Harris*, 401 U. S. 37 (1971). That case involved a state "criminal syndicalism" statute with much more serious implications for free speech than the statute at issue in the present case.[12] Even in this context, however, the Court cautioned against excessive reliance on "chilling effect."

> "[T]he existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so." *Id.*, at 51.

We have already demonstrated that the effect on speech is minor. The need for hate crime legislation is ably set forth in other briefs filed in this case. All that remains is the lack of alternatives.

The Wisconsin Legislature has determined that aggravated battery upon a victim selected because of his race needs to be punished by a sentence of up to seven years. *Mitchell supra*, 485 N. W. 2d, at 809. This assessment of the needed punishment is surely within the

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12. Among other things, the directly prohibited teaching and advocacy of "criminal syndicalism." *Id.*, at 38, n. 1.

legislative competence. See *Harmelin* v. *Michigan*, 115 L. Ed. 2d 836, 860-861, 111 S. Ct. 2680, 2698 (1991) (opinion of Scalia, J.); *id.*, 115 L. Ed. 2d, at 867, 111 S. Ct., at 2703 (opinion of Kennedy, J.). If this cannot be accomplished by raising the penalty for "hate crime" aggravated battery alone, the only other way is to raise the penalty for *all* aggravated battery. That is not a feasible alternative.

The fact that aggravated battery can be punished without the enhancement does not make the enhancement unnecessary, and simply repealing the enhancement is not an alternative. To make the punishment fit the crime, including the especially pernicious *mens rea* involved in this case, the enhancement provision is necessary.

The "chilling effect" in this case is thus no greater than that which exists in the definitions of numerous unquestioned criminal laws. It is insufficient to warrant striking down this statute.

IV. A vagueness challenge cannot be sustained in this case.

The contention that the statute is unconstitutionally vague is easily disposed of. The statute is crystal clear as applied to Mitchell's conduct in the case before the Court. Mitchell and his group had the specific purpose to beat someone because of his race, and they did so. *State* v. *Mitchell*, 485 N. W. 2d 807, 809 (Wis. 1992).

Unlike overbreadth, a vagueness challenge may only be made on the facts of the present case. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U. S. 733, 756 (1974).

CONCLUSION

The decision of the Wisconsin Supreme Court should be reversed.

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Respectfully submitted,

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